BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARY JOANN ROBLES	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,061,870
BRAUMS, INC. #103	)	
Self-Insured Respondent	)	

ORDER

Respondent requests review of the November 7, 2012 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

APPEARANCES

Phillip B. Slape, of Wichita, Kansas, appeared for the claimant. Bret C. Owen, of Topeka, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board has adopted the stipulations and considered the same record as did the ALJ, consisting of the transcript of preliminary hearing taken on November 6, 2012, with attached exhibits.

ISSUES

The Administrative Law Judge (ALJ) found claimant was injured out of and in the course of her employment with respondent on February 16, 2012, and authorized Dr. John Fanning to be claimant's authorized treating physician.

The respondent requests review of whether claimant's accident arose out of and in the course of her employment; whether claimant's injury occurred as a result of a normal activity of day-to-day living; and/or whether claimant's accident or injury arose out of a neutral risk with no particular employment or personal character. Respondent argues that the Order should be reversed.

Claimant argues that the Order should be affirmed.

FINDINGS OF FACT

Claimant had been an employee of respondent for seven years as of February 16, 2012. On that date, claimant clocked out and was walking across respondent's parking lot when she stepped on a black rubbery hose and almost fell. Claimant twisted her right ankle. She described the hose as being hard rubber, three inches long and approximately one inch in diameter. She thought it had been discarded or dropped from an automobile which had driven through respondent's parking lot.

Claimant acknowledged the parking lot was dry and the weather was good on the date of accident. She was wearing her work tennis shoes and carrying only her purse. She was not running, only walking in a normal fashion. Claimant agreed that she normally walked with her children 30-40 minutes every other day for exercise.

Respondent acknowledged at the preliminary hearing that the incident was the prevailing factor in causing the injury. However respondent contends walking is a normal activity of daily living and the accident constituted a neutral risk to claimant.

PRINCIPLES OF LAW AND ANALYSIS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

K.S.A. 2011 Supp. 44-501b states:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.
> (d) Except as provided in the workers compensation act, no employer, or other employee of such employer, shall be liable for any injury, whether by accident, repetitive trauma, or occupational disease, for which compensation is recoverable under the workers compensation act nor shall an employer be liable to any third party for any injury or death of an employee which was caused under circumstances creating a legal liability against a third party and for which workers compensation is payable by such employer.

K.S.A. 2011 Supp. 44-508(d) states:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event , usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2011 Supp. 44-508(f)(2)(B) states:

> (f)(2) . . . (B) An injury by accident shall be deemed to arise out of employment only if: (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2011 Supp. 44-508(f)(3)(A)(B) states:

> (3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
> (iii) accident or injury which arose out of a risk personal to the worker; or
> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.
> (B) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

"Burden of proof " means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more

probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.[1]

Respondent contends the damage suffered by claimant was the consequence of the "normal activities of day-to-day living". That phrase was a part of the Workers Compensation Act (Act) before the 2011 statutory amendments were enacted. Those recent amendments did nothing to change or modify that statutory language. That language was construed by the Kansas Supreme Court in *Bryant*.[2]

The issue in *Bryant* was whether an accident was work related or a natural consequence of an activity of day-to-day living. The Supreme Court first provided an extensive analysis of work accidents and noted the proper approach would be to focus on whether the injury occurred as a consequence of the broad spectrum of life's ongoing daily activities, such as chewing or breathing or walking in ways that were not peculiar to the job, or as a consequence of an event or continuing events specific to the requirements of performing one's job. The Court stated, "the right to compensation benefits depends on one simple test: Was there a work-connected injury? . . . [T]he test is not the relation of an individual's personal quality (fault) to an event, but the relationship of an event to an employment", citing 1 Larson's Workers' Compensation Law sec. 1.03[1] (2011).[3]

This Board Member acknowledges the simple act of walking across a parking lot would easily be deemed an "activity of day-to-day living". However, the accident and resulting injury suffered by this claimant did not stem just from the act of walking. This respondent's business relies on steady customer participation in its business. This necessitates a high volume of vehicle traffic through its parking lot. The presence of the piece of hose in the parking lot appeared to be a direct result of that traffic. Therefore, the act of twisting one's ankle while stepping on a piece of discarded hose placed this claimant in a more precarious position than the simple act of walking. This Board Member finds claimant suffered personal injury by accident which arose out of and in the course of her employment with respondent. This Board Member also notes the legislature allowed prior statutory language requiring the Act to be liberally construed for the purpose of bringing employers and employees within the provisions of the Act to remain without modification.[4]

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[1] K.S.A. 2011 Supp. 44-508(h).

[2] *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2011).

[3] *Id.* at 595-596.

[4] K.S.A. 2011 Supp. 44-501b(a).

Finally, respondent argues that claimant's fall was the result of a neutral risk and not compensable. The Board has addressed this issue before. As noted in *Weatherford*[5] a neutral risk encompasses a situation where there is no explanation for the cause of the accident, i.e. it is neither personal to the claimant or caused by the employment. Here, claimant stepped on a piece of litter in respondent's parking lot, left there by one of respondent's customers. The accident was not unexplained.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied her burden of proving she suffered an injury by accident which arose out of and in the course of claimant's employment with respondent, and was not the result of the normal activities of claimant's day-to-day living. Additionally, claimant's accident was not the result of a neutral risk as there was a clear employment character to the accident and resulting injury. The award of benefits by the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge John D. Clark dated November 7, 2012, is affirmed.

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[5] *Weatherford v. U.S.D. #229*, Docket No. 1,058,469, 2012 WL 1142974 (WCAB March 14, 2012).

[6] K.S.A. 2011 Supp 44-534a.

IT IS SO ORDERED.

Dated this _____ day of January, 2013.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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John D. Clark, Administrative Law Judge